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RUDNER LAW

ALTERNATIVE DISPUTE RESOLUTION
RUDNER LAW

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INTRODUCTION

The last few months have seen tremendous disruption of our society and our economy. Many businesses have been shut down or suffered drastically reduced revenues, and many had to find ways to reduce their labour costs accordingly. Unfortunately, the swiftness with which COVID-19 caused our economy to shut down meant that many employers had to take action without getting proper advice, which led to potential liability and to less than strategic decisions.

After months of discussing layoffs and pay cuts, the discussion is shifting to getting back to business, if not quite back to normal. There is more time to plan this phase, and we are hopeful that organizations will make more informed decisions as they bring their workers back. We have been inundated with questions about how to recall employees, obligations regarding safety in the workplace, whether workers have to return to work if they prefer to remain off work or to work remotely, and many other issues.

Every industry and every business has its own unique set of circumstances. Some have been shut down completely through the pandemic. Others, particularly essential services, may be busier than ever. And most are somewhere in between; they may have some workers on layoff, some working remotely, and some physically in the workplace. Many have dramatically changed their operations, minimizing personal contact and focussing on remote or curb-side service. In many cases, they are getting assistance through the Canada Emergency Wage Subsidy (CEWS) and other programs.

Some employees were laid off (voluntarily or otherwise), some are receiving Employment Insurance (EI) or the Canada Emergency Response Benefit (CERB), and some are working reduced hours or full-time hours at reduced pay. Some cannot return to work even if it is available, as they have kids at home that need to be looked after, or they have medical conditions which cause them to be at greater risk and cannot be out in public.

Most businesses that laid people off had never done so before. They did not have time to fully understand the layoff process, but they do have time to plan the next phase. There are more questions than ever. Hopefully, this guide will provide helpful information for both employers and employees regarding their rights and obligations, so that everyone can make informed decisions as we move forward.

As an employer, acting without understanding the legal implications can mean that you will be spending money needlessly at a time when you cannot afford to, or taking on potential liability that can be avoided.

As an employee, you need to know what can lawfully be expected of you and what your rights are. Otherwise, you may be sacrificing your rights or “leaving money on the table” when your family needs it most.

Disclaimer

The information in this guide is general in nature and not intended to be relied upon as or to replace legal advice. Every situation is different, and your rights and obligations will depend on the specific factual circumstances. Furthermore, the COVID-19 situation has seen continuous change, with constant new developments with respect to the legal framework, the assistance

available, and the medical and societal background. As a result, we must stress that the information contained herein is **current as of May 18, 2020** unless otherwise indicated.

There is a lot of information about specific topics discussed in this guide on our website, our blog, our running blog on COVID-19 and the workplace, as well as our social media platforms. You can receive our Employment Law updates in your inbox by signing up for our newsletter.

We encourage you to obtain the strategic legal advice that you need before making any decisions that will impact your legal rights.

If you think that you might need an Employment Lawyer, you probably do.

Which Laws Apply?

Employment laws can become confusing due to the mix of legislation, common law, and contract that can all govern the same relationship. Here are a few key points to remember:

1. Employment Law is provincially regulated, so every province and territory has its own set of laws. Businesses in industries that are federally regulated, such as banking and transportation, are governed by federal laws such as the *Canada Labour Code*.
2. Each jurisdiction has legislation relating to issues including
    a. Employment standards
    b. Human rights, and
    c. Occupational health and safety,

    all of which impact the employment relationship.
3. The employment relationship is also regulated by the common law, which is judge-made law that has evolved over time.
4. Some common law rights can be displaced by contract.
5. Every employee has a contract. Some are written, while many are a combination of verbal discussions, rights implied by law, and established practice.
6. Much **of the information below relates to workers and workplaces that are not unionized and not governed by collective agreements.** The rights of the parties can be very different if there is a collective agreement.
7. Every situation should be approached with all relevant laws in mind. For example, while employment standards may address how to implement temporary layoffs, other laws may set out requirements for doing so and turn a temporary layoff into a constructive dismissal if it is not implemented properly.

SECTION I: RECALLING OR REINTEGRATING WORKERS

Does an employer have to recall all laid off workers?

No. Many organizations will not be able to return to 100% capacity immediately. You should assess your operational needs and then determine how many and which members of your

team are required. The assessment should include consideration of your operational needs as well as safety concerns (discussed in detail below) with respect to physical distancing, which may mean that you cannot physically accommodate a full complement of workers.

The recalls can be staggered as you resume business, bearing in mind the time limits referenced below.

How long can an employee be on layoff?

Most employment standards legislation establishes maximum periods for temporary layoffs, although some do not. Once those time limits are exceeded, a temporary layoff is deemed to be a termination. In that case, you would have to compensate the employee in the same way as if you had dismissed them on a without cause basis, which can involve a substantial cost. In light of the ongoing pandemic-related restrictions, some governments have extended the time limits.

In Ontario, the *Employment Standards Act, 2000* (**ESA**) sets out the parameters for temporary layoffs in Ontario. Pursuant to the ESA, a layoff cannot last more than 13 weeks in any 20 week period, although that can be extended to 35 weeks in any 52 week period in some circumstances, such as if the employer continues employee benefits or supplements their Employment Insurance benefits.

In British Columbia, the applicable statute states that temporary layoffs cannot exceed 13 weeks in a 20-week period. However, the provincial government temporarily amended the applicable statute in light of the COVID-19 pandemic, extending the period to up to 16 weeks in a 20-week period, where COVID-19 is at least a part of the reason for the layoff.

In Alberta, the applicable statute provides that temporary layoffs cannot exceed 60 days in a 120-day period. However, similar to the Government of British Columbia, the layoff period has been extended in Alberta as well, in light of COVID-19. The limit in Alberta is now 120 days, and this period can be further extended under certain specific circumstances, with the employee's agreement. Interestingly, the Alberta statute also sets out the recall notice procedure: an employer must provide an employee with a written notice of a layoff in accordance with their length of service, unless a collective agreement states otherwise.

If a layoff is approaching the time limits, what options are available?

If a layoff is approaching the time limits outlined by the applicable statute, the employer has the following options:

1. Recall the worker, whether that be fully, partially, or without actually requiring that they work (subject to the risks discussed below);
2. Maintain the status quo, in which case the layoff will be deemed to be a termination of employment; or
3. Terminate the employment relationship.

Where an employer maintains the status quo and fails to recall workers prior to the expiration of the applicable statutory layoff period, the temporary layoff is then deemed to be a termination of employment. This is important and is often misunderstood. Even where the employer intends to return the employee back to work in the foreseeable future, as long as the applicable statutory period expires, the employee's employment would be deemed to be terminated, and they would be entitled to compensation in the same way as if they had been dismissed on a without cause basis. The employee may then be entitled to significant compensation from the employer. The same would apply, of course, if the employer simply

terminates the employment relationship outright. As discussed below, contracts can be used to significantly reduce an employee's entitlement on termination; for that reason, individuals should ensure that they understand the meaning of every clause in an employment contract they are asked to sign.

In order to maintain the employment relationship, an employer may choose to recall the employee, even if they are not actually required to work. If the employer is eligible for the CEWS, they can use the wage subsidy to pay up to 75% of the employee's salary and make best efforts to top up the employee's salary to pre-crisis levels. Where the employer is unable to top up the employee's salary, we would strongly advise the employer to document the decision based on their financial situation, in case there is an audit in the foreseeable future.

Are there restrictions on the order in which workers can be recalled?

If the workplace is unionized, then the collective agreement likely sets out the procedure for recalling workers. Otherwise, unless there is a relevant policy in place, which is unlikely, employers are entitled to decide who to bring back and when. Much like hiring and firing, employers can make these decisions based on any reasons at all, or no reason; that is the employer's prerogative.

The only exceptions are:

A. employers cannot make such decisions based on grounds protected by the applicable human rights legislation; and
B. employers cannot engage in reprisal against an employee; that is, employers cannot penalize or threaten to penalize an employee for trying to exercise their legal rights.

It is important to note that the Ontario Human Rights Commission has stated its view that negative treatment of employees who have, or are perceived to have, COVID-19, is prohibited by the Ontario Human Rights Code.

How do you recall workers from a layoff?

Most businesses are not in the habit of temporarily laying workers off. When the pandemic struck, many had to react quickly and often without legal advice. They may not even have had the right to impose layoffs. Now that it is time to discuss recalling workers, these organizations are often completely unaware of how to do so.

Like many of the topics we are discussing, the answer will depend on the jurisdiction you are in. Of course, an employee must be told that they are expected to return to work. While not every jurisdiction requires that the notice be in writing, we highly recommend it.

The notice of recall should indicate the date upon which the employee is to return to work, along with a clear indication that a failure to do so will be deemed to be a resignation. It should also advise that if there is some reason why they cannot return as directed, they must contact the organization immediately to discuss the issue, and that simply ignoring the notice will result in the end of their employment.

If there will be any changes to the terms of employment, those should be clearly indicated and, if appropriate, the worker should be asked to confirm their agreement.

Communication is Key

The notice of recall is a good opportunity to make employees aware of the measures being implemented to ensure the safety of the workplace. This has two purposes: 1) to reassure the workers and 2) to make them aware of the expectations regarding their conduct and the consequences of failing to abide by those expectations. As discussed in more detail below, health and safety policies and procedures should be developed in relation to COVID-19 and clearly communicated to all workers.

Can workers be brought back on a part-time basis, or with reduced compensation?

As lawyers often say, “It depends”.

Generally speaking, employers have the management right to make reasonable changes to the employment relationship. However, if the employer makes a unilateral and substantial change to a fundamental term of employment, including an employee’s hours of work and/or pay, then that constitutes a constructive dismissal. This is discussed in more detail below.

It is important to note that whether or not an employee has a written contract does not impact the answer to this question. **Every employee has a contract of employment;** some are written, and most are a combination of verbal discussions, rights implied by law, and established practice.

In order to minimize liability, employers should not implement any substantial changes without a written agreement from the affected employee(s). We recommend that if a worker agrees to such changes, the agreement be clearly limited to the unprecedented circumstances we are in, temporary in nature, and not to be taken as a precedent for acceptance of future changes.

Can an employer require that the employee sign a new contract?

Generally, no. An employer can never impose a new contract. However, if the employer provides either 1) consideration (something of value) for the new contract or 2) notice of the termination of the current contract (which can be substantial in some cases), then a new contract can be implemented.

Consideration means that the employer must provide the employee with something of value in exchange for signing the agreement. For new employees, they are gaining employment in exchange for signing the employment agreement. One of the most common mistakes that employers make is only having new hires sign their contract when they arrive for their first day of work; at that point, they already have a verbal agreement that cannot simply be replaced.

For existing employees, putting a new written agreement in place becomes more complicated because they already have the job, so employment cannot constitute valid consideration. Instead, the employer must provide some form of fresh consideration, such as a signing bonus, promotion or salary increase. If the employee declines the offer, however, then the current contract would continue to apply.

Alternatively, the employer may provide the employee with notice that on a date in the future, the new contract of employment will be in effect. This is effectively giving notice of the termination of the existing contract. The amount of notice will be the same as if the employment relationship is being terminated without cause, which can be quite substantial.

We do not necessarily recommend implementing new contracts as workers are brought back in the current pandemic, and we would certainly warn employees to be cautious about signing a new contract. However, as discussed below, as part of a long-term HR strategy, updating or implementing contracts, policies and procedures is advisable. It is always better for both parties to be aware of all terms of the relationship rather than leaving them to speculate or make assumptions.

If a worker has continued to be paid (or receive the CEWS) but has not been working, are there any limits on how or when they can be required to return to work?

No. There is no active work requirement under the CEWS; the employee simply needs to be on the payroll. Employers have the discretion to decide how or when an employee can be required to return to work, subject to any applicable collective agreement, contract or policy, and as long as they do not breach the employee's human rights or engage in reprisal against the employee.

The "recall" to work will be similar to the situation where the employee was laid off; the only difference is that the employee was not technically laid off. Either way, if you are directed to return to work, you should do so or you will risk being deemed to have resigned. If you have a legitimate, legally defensible reason not to (as discussed in more detail below), you should communicate that to your employer and discuss next steps. Of course, all such discussions should be documented.

SECTION II: EMPLOYEE RIGHTS AND REFUSALS

What if a worker refuses to return to work when recalled?

Simply put, employees are expected to attend at work when directed, so long as it is not inconsistent with the terms of their employment. Attending at work is not optional. That is true whether you are working day in or day out in "normal" times, or whether you have been officially or unofficially laid off due to the coronavirus.

There are some potential exceptions to the requirement that an employee attend at work when recalled. They are:

1) An entitlement to job-protected leave, such as the new leaves put in place which protect employees who cannot work due to COVID-19 in some jurisdictions;
2) An entitlement to accommodation under the *Human Rights Code*, such as an employee that is immunocompromised or has childcare obligations; or
3) The right to refuse unsafe work (as discussed below).

With respect to the third point, the danger must be specific to the workplace and not a general concern about going out during the pandemic. The legislation generally refers to danger as opposed to risk; the threshold is high, even in times like these.

That said, while a more general concern about contracting the coronavirus may not constitute reason to refuse unsafe work, an employee with a medical condition that causes them to be at elevated risk may be entitled to accommodation. Similarly, employees with family members that have medical concerns, that they live with, may also be entitled to accommodation.

Without a legally valid reason, refusing to attend at work for regular working hours is, effectively, an abandonment of one's job. Therefore, all discussions regarding the reason for the refusal should be documented.

Whatever the reason, if an employee has concerns about returning to work, the parties should discuss the issues and then determine a solution. In some cases, it will be beneficial to both parties to have the worker remain on a leave of absence. For example, if the employer cannot bring all staff back and the worker does not want to come back, having them remain off work can be a "win-win".

If the employer needs to have the individual back at work, the parties can discuss whether any form of accommodation is possible. For example, we have heard of employers providing Uber or other transportation to work for employees that were scared to use public transportation but had no other way to get to work. Alternatively, remote work may be possible.

That said, if the employer insists that the employee attend at the workplace, and there is no legal basis to refuse and no interest on the part of the employer to allow them to stay on leave, then the employee may have to choose between returning to work and resigning.

While employers should be respectful of legitimate concerns, in the absence of a legitimate reason to be absent from work, employees are expected to carry out their duties.

What if an employee believes the workplace is unsafe?

While legislation differs slightly from jurisdiction to jurisdiction, employees are generally entitled to refuse to work if it is unsafe.

If an employee reports a concern about an unsafe workplace, the employer is required to investigate the situation and advise the employee whether the safety risk has been resolved or not. If the employee continues to believe there is a safety concern, the Ministry of Labour can be asked to come in to investigate. Recently, several provinces including Ontario have increased the resources available to respond to safety concerns as a result of the COVID-19 pandemic.

Workers should be mindful of the fact that the right to refuse unsafe work is intended to protect them when the workplace is unsafe. There must be reasonable and legitimate grounds for the employee to believe there is a safety risk in the workplace. A fear of getting sick, if there are no current incidents in the workplace or other risk factors, is likely not sufficient. However, in a situation where another employee has been diagnosed with COVID-19 or where the employee is interacting regularly with the public, there may be a legitimate concern that needs to be addressed by the employer to ensure the health and safety of all workers.

Can an employee demand to work from home?

Generally speaking, no.

The guidelines provided by medical authorities and our governments have set out a variety of methods to help reduce the risk of transmission. They are, effectively, a hierarchy with isolation/remote work being the preferred method. As a result, we are encouraging our employer clients to insist upon remote work where it is viable. However, if it is not, an employee cannot insist that they be allowed to work from home. As discussed elsewhere, if they have a

right to accommodation, then the analysis will be different as the employee will have expanded rights.

What if an employee is unable to work due to childcare or family obligations?

Some provinces provide for job-protected leaves of absence in cases where an employee is unable to work due to child care obligations or to care for someone in their family and several have added provisions specifically in relation to COVID-19. For example, in Alberta, employees are entitled to indefinite statutory unpaid leave if they are required to care for a family member under quarantine or children affected by school and daycare closures due to COVID-19.

Furthermore, human rights legislation would provide protection to employees in most situations like this and would preclude the termination of their employment due to such family obligations.

Under human rights legislation, employers have the duty to accommodate employees on the basis of family status (or similar grounds) up to the point of undue hardship.

Undue hardship is a high threshold to meet. For example, the employer cannot simply deny an employee's accommodation request by saying "it costs too much!" without assessing the individual's situation and considering options for accommodation. Employers should not arbitrarily deny any accommodation request.

Importantly, employers are obligated to provide reasonable accommodation, and not the employee's preferred form of accommodation. Employers can explore alternative options, including allowing employees to work remotely or to vary their hours to share caregiving responsibilities with other family members. An employer does not have to invent a different job or create work for an employee in order to allow them to work remotely. However, as a best practice, an employer should ensure that they have explored all options to determine whether remote work is possible in the circumstances.

We would strongly recommend that parties in such circumstances document the accommodation process carefully.

What if an employee or a family member is immunocompromised or otherwise at an increased risk - do they have to return to work?

If an employee is immunocompromised or has other medical conditions which cause them to be at increased risk of becoming infected with the virus, or if they live with someone who is, then that is likely to trigger the employer's duty to accommodate under applicable human rights legislation based on the protected ground of disability, marital status and/or family status.

In that case, the employer would be obligated to accommodate the employee up to the point of undue hardship, and the considerations noted above regarding accommodation and the statutory job-protected leave would be applicable here as well.

An employee in such circumstances would have to make a request for accommodation and provide sufficient medical information to explain the need for accommodation, so that the employer could assess the need and possibility of accommodating the worker.

At that point, the onus would shift to the employer to assess whether accommodation is required and, if so, whether it is possible. In the COVID-19 context, such accommodation is likely to include either remote work or a leave of absence.

What if an employee prefers not to leave home to go to work?

As stated above, employees are expected to attend at work during their regular working hours, including when recalled from a formal or informal layoff. Some exceptions apply, as discussed previously, but they relate to an inability to work, a need for accommodation, or a danger in the workplace; none of them are based on a preference or generalized concern about going out in public.

While employers should be respectful of legitimate concerns, in the absence of a legitimate reason to be absent from work, employees are expected to carry out their duties.

Can an employee refuse to return to work due to concerns about commuting to and from work via public transportation?

The duty to make reasonable efforts to provide a safe workplace does not generally extend to the means of getting to and from work. While the employee's concern may be understandable, it would not attract legal protection in most cases and would not excuse them from attendance at work. We are aware that some employers have instituted measures to address this concern, such as providing Uber or other transportation options to their employees. However, this is not generally required.

However, if an employee has an underlying health condition which increases their risk of contracting the coronavirus, or could result in a more severe reaction if they do, then human rights legislation may require accommodation on the part of the employer.

In most jurisdictions, this duty to accommodate will also apply if the employee has a family member with a similar medical condition.

In that case, the employer would be obligated to accommodate the employee up to the point of undue hardship, and the considerations noted above regarding accommodation and the statutory job-protected leave would be applicable here as well.

An employee in such circumstances would have to make a request for accommodation and provide sufficient medical information to explain the need for accommodation, so that the employer could assess the need and possibility of accommodating the worker.

At that point, the onus would shift to the employer to assess whether accommodation is required and, if so, whether it is possible. In the COVID-19 context, such accommodation is likely to include remote work, a leave of absence, or altered work schedules.

SECTION III: ENSURING HEALTH AND SAFETY IN THE WORKPLACE

What are an employer's duties to prevent the spread of the virus?

While there are nuanced differences between jurisdictions, employers are generally expected to take all reasonable precautions to protect the health and safety of their workers. That is no

different now than it is in other times, but the considerations are, of course, different during a pandemic.

An employer does not have to guarantee the safety of workers, which would be impossible. But they must comply with their obligations regarding preventing safety risks and addressing any concerns that are raised.

While the circumstances we are currently in are novel and unprecedented, and we are all struggling to determine the best safety practices, employers should follow the advice and guidelines provided by public health authorities and our governments in order to reduce the risk of transmission of COVID-19. Most governments have provided detailed guidelines in order to help organizations safely resume operations, and it will certainly not look good if an employer is found to have failed to follow them, since that would generally be inconsistent with taking "all reasonable precautions".

The preferred method of limiting transmission continues to be isolation; for that reason, where remote work is possible, it should be the first choice. Where that is not possible, efforts to ensure physical distancing should be implemented, including visual and physical barriers. For example, an organization may move forward with:

- Management employees working from home
- Supervisory employees in the workplace but maintaining physical distance
- Manual labourers in the workplace, maintaining physical distancing to the extent possible and using masks, gloves, and other Personal Protective Equipment
- Clerical workers working from home, and
- Customer facing workers in the workplace, maintaining physical distancing where possible, having plexiglass or other barriers in place and using Personal Protection Equipment.

Other ways to reduce risk will include

- Reconfiguring the workplace to ensure physical distancing
- Provision of Personal Protective Equipment such as gloves and masks
- Deep cleaning the workplace
- Providing soap and hand sanitizer
- Cleaning the ventilation systems, and
- Ensuring proper air filtration

When the risk cannot be controlled by a single method, employers should implement a combination of tools to do so.

Once the employer has determined how they will control the risks, they should create policies and procedures in place to clearly set out the plans and expectations. It is critically important to establish the rules of the workplace, which will serve both to reassure workers of the efforts being made to protect them and to establish expected conduct. Like any workplace rule or policy, these should be actively enforced and violations should result in discipline.

It is vital that employers communicate the rules and expectations to everyone, as well as the procedure for reporting safety concerns.

What resources are available to assist in maintaining a safe workplace?

The federal government has outlined risk mitigation strategies for employers, specific to the nature of the workplace, including but not limited to physical distancing measures, increased sanitization measures, and travel restrictions.

The respective provinces also released resources to assist employers re-open while maintaining a safe workplace. In Ontario, the government released safety guidelines to provide direction to those working in various sectors, such as manufacturing, restaurant and food service, retail, health care, construction, transportation, police services, firefighters, and transit employees.

If people cannot work remotely, does an employer have to ensure physical distancing and/or provide PPE?

There is no obligation to use specific methods of controlling the spread of the virus. Rather, the duty is to take all reasonable steps to ensure a safe workplace. That will depend upon the specific circumstances.

Can an employer require that employees have their temperature tested before entering the workplace, or other such testing?

Issues such as this involve a balancing of the employee's right to privacy with the employer's duty to take all reasonable steps to ensure a safe work environment. Generally speaking, employers are not entitled to infringe the employee's privacy rights. As a result, any intrusive means of testing and any obtaining of an employee's personal medical information will be offside. However, if the safety benefits of the testing or infringement outweigh the violation of the employee's privacy rights, and if there is no less intrusive means of ensuring the health and safety of workers, the intrusion may be justified. In the case of temperature testing, there are questions about its ability to identify those who have the virus, which make it more difficult to justify in many contexts.

Every situation will be assessed based upon its own particular set of circumstances. Just because a form of testing is acceptable in one organization or industry does not mean that it will be in another. For that reason, although some organizations have publicly adopted temperature screening or testing requirements, other organizations should not assume that they have the right to do so.

If you are going to adopt any procedures that impact an employee's privacy rights, we suggest making all efforts to ensure the intrusion about their privacy is minimized and that informed consent is received.

Can an employee be required to provide test results confirming they do not have the virus? What if they had previously tested positive?

As above, issues such as this involve a balancing of the employee's right to privacy with the employer's duty to take all reasonable steps to ensure a safe work environment. Generally speaking, employers are not entitled to infringe the employee's privacy rights. As a result, any intrusive means of testing and any obtaining of an employee's personal medical information will be offside. However, if the safety benefits of the testing or infringement outweigh the violation of the employee's privacy rights, and if there is no less intrusive means of ensuring the health and safety of workers, the intrusion may be justified.

Every situation will be assessed based upon its own particular set of circumstances. Just because a form of testing is acceptable in one organization or industry does not mean that it will be in another. For that reason, although some organizations have publicly adopted

temperature screening or testing requirements, other organizations should not assume that they have the right to do so.

Can an employee demand Personal Protective Equipment (PPE)?

As discussed above, the guidelines provided by medical authorities and our governments have set out a variety of methods to help reduce the risk of transmission. No one method is required in all circumstances but in every circumstance, employers will be expected to assess the health and safety risks and determine the appropriate safety measures to put in place. Those may include remote work, physical distancing, and/or the provision of PPE.

If PPE is necessary to provide a safe work environment, it must be provided. However, employees do not otherwise have the right to demand it. As discussed elsewhere, if they have a right to accommodation, then the analysis will be different as the employee will have expanded rights.

If an employee believes that the workplace is unsafe, they can report their concerns as discussed above and involve the Ministry of Labour if their concerns are not properly addressed.

What remedy does a worker have if they become ill or contract the coronavirus in the workplace?

Although people often talk about “workers’ compensation”, most legal regimes call it something else, such as Workplace Safety Insurance Benefits. If an employee contracts the COVID-19 virus in the performance of their duties, they could be entitled to benefits. They would have to establish that they were infected in the workplace. It is important to note that the issue of proof may change; for example, Ontario recently amended its legislation to provide additional protection to workers who work for a business that has been listed as an essential business. If they receive a positive test for COVID-19, the disease is presumed to be an occupational disease that occurred due to the nature of the worker’s work, unless the contrary is shown.

Note that this is not a fault-based system; even if the employer met its duty to make all reasonable efforts to provide a safe workplace, the employee would still be entitled to benefits if they can prove, on a balance of probabilities, that they contracted the virus at work. Several provincial workers’ compensation boards have already stated that workers who have been diagnosed with COVID-19 and who were infected during the performance of their job could be entitled to benefits.

If an employer is not covered by workplace safety insurance, the employee may be able to file a civil claim for damages.

SECTION IV: TERMINATION OF THE EMPLOYMENT RELATIONSHIP

Can an employer choose to terminate an employee during the COVID-19 pandemic?

Yes. Generally speaking, employers can dismiss an employee at any time and for almost any reason. The exceptions would include human rights grounds (which may include testing positive or exhibiting symptoms of COVID-19) and reprisals.

Since we are discussing dismissals without cause, the dismissed employee will be entitled to either notice or pay in lieu (often referred to as "severance"). Contrary to popular belief, the amount of notice or compensation to be provided can be quite extensive. While employment standards legislation sets out the absolute minimum notice required, most employees will be entitled to "reasonable notice" pursuant to common law. There are no easy calculations for determining how much notice is reasonable, but it can be up to two years or even more if there are exceptional circumstances. For additional information on this topic, click here.

As discussed below, the obligation to provide severance can be reduced through the strategic use of termination clauses in employment contracts.

How do you assess an employee's severance entitlement if they are dismissed?

This will surprise many, but in Canada, most employees can be dismissed at any time, for almost any reason. However, unless there is just cause for dismissal, notice or pay in lieu is required. The question, then, is what are they entitled to?

Contrary to popular belief, dismissed employees are not automatically entitled to a "package". Employers can offer working notice, salary and benefit continuance, a lump sum, or a combination of the above.

In order to determine an employee's entitlement to notice or severance, regard must be had to:

1. Employment standards legislation,
2. The common law, and
3. Any enforceable termination clause in a contract.

Employment standards legislation sets out the minimum entitlements, and it is based solely upon length of service. However, that is only one small part of the assessment. The common law requires that "reasonable notice" be provided, and this is based upon a number of factors, including:

- The employee's age,
- Length of employment,
- The nature of their position, and
- The availability of similar employment.

Another factor that is often relevant is inducement. If an employee was lured away from secure employment, their entitlement will be increased.

The notion that severance is always one month per year of service is simply a myth. Our courts have explicitly stated that severance is not based on length of service alone. And the reality is that the number of potential factors, and the discretion afforded to courts when assessing

entitlement to severance, make it impossible to predict a specific individual's entitlement with certainty.

It is important to bear in mind that the entitlement to severance is subject to the dismissed employee's duty to make reasonable efforts to find new work, and if they do obtain new employment, your obligation to them will be reduced. As a result, someone may be "entitled" to a lengthy notice period, but if they find new work within that period, your obligation will be reduced.

Strategic Use of Contract

The obligation to provide reasonable notice can be displaced by a properly-drafted termination clause in an enforceable contract of employment. If done properly, then the common law obligations will be rendered meaningless by a termination clause. Such a clause will help you to avoid the cost and risk of trying to determine what is reasonable; instead, you can simply look at what the contract provides.

Unfortunately, many employers follow the advice to implement contracts with termination clauses, but fail to do so properly and end up with clauses that are unenforceable. That is why we always advocate working with us to implement contracts; we can help you to ensure that you will be able to rely upon them when you need them.

Is the severance entitlement different if they are constructive dismissed, or deemed to have been dismissed because a temporary layoff lasted too long?

If an employee is found to have been constructive dismissed, then their legal position is the same as an employee that has been dismissed outright. The same is true if their employment is deemed to have been terminated due to the fact that their temporary layoff extended beyond the time limits set out in the applicable employment standards legislation.

As discussed above, they will be entitled to severance, which will be guided by the principles of reasonable notice unless there is an enforceable termination clause in place.

Can an employee be dismissed if they refuse to return to work?

If an employee refuses to return to work then, as discussed above, they can be deemed to have resigned. While it is open to an employer to impose discipline and, ultimately, dismissal in that situation, it is often a more pragmatic approach to deem them to have abandoned their job and resigned. For more information about dismissal for cause, click here.

Can an employee collect Employment Insurance or CERB benefits if they resign or refuse to return to work?

Generally speaking, no. Neither Employment Insurance nor CERB benefits are available to individuals that voluntarily resign from their employment.

SECTION V: THE CANADA EMERGENCY WAGE SUBSIDY (CEWS)

What is the CEWS?

As the government website explains, the Canada Emergency Wage Subsidy is a subsidy that will provide a subsidy of 75% of eligible remuneration, paid by an eligible entity (eligible employer) that qualifies, to each eligible employee—up to a maximum of $847 per week.

Eligible employers, such as business owners, that see a drop of at least 15% of their qualifying revenue in March 2020 and 30% for the following months of April and May, when compared to their qualifying revenue for the same period in 2019 (or the average of January and February 2020, in some circumstances), will qualify for the wage subsidy. Special rules apply for certain other employers.

The CEWS is intended to help employers pay their staff during these difficult times, even if they have sustained a significant drop in revenue. The purpose of the subsidy is to help employers to keep employees on the payroll, to avoid layoffs, and dismissals or to encourage swift recalls of employees that have already been laid off.

In short: the CEWS will be provided to a qualifying entity in respect of eligible remuneration paid to an eligible employee in a week during a qualifying period up to a maximum of $847 per week.

Originally, the program was to be in place from March 15 to June 4, 2019 but it has been extended to August 29, 2020.

What is a qualifying entity?

An “eligible entity” is very broadly defined in the legislation - essentially, any entity which is not tax-exempt or a public institution.

Any entity which is not tax exempt or a public institution and which experiences a reduction in revenue of at least 15% or 30% depending on the qualifying period that the employer is applying for. Whether or not an employer is going to meet the reduction in revenue criteria is determined in reference to the same month in the year prior, so to qualify for the qualifying period which runs from March 15 to April 11, employers must assess whether they have experienced a reduction in revenue of at least 15% in March 2020 as compared to March 2019. Alternatively, employers can elect to use their average revenues earned in January and February of this year as the reference period. However, keep in mind if you make this election, this reference period will apply going forward, so you can’t switch back and forth, once you’ve chosen the January February reference period, that’s going to apply with respect to your application in all further qualifying periods. The great news is that if you meet the revenue reduction criteria in one qualifying period, the legislation automatically deems you to have met it for the next qualifying period.

What is eligible remuneration?

Eligible remuneration includes things like salary, wages, taxable benefits, fees, and commissions. It does not include a retiring allowance, severance pay, stock option benefits, dividends, personal use of a corporate vehicle, etc. It will also not include a temporary increase in wages paid to an employee where the purpose is to increase the amount of the CEWS.

The baseline remuneration to be used is the average weekly remuneration paid between January 1 and March 15, 2020, excluding any period of seven or more days for which the employee was not remunerated.

Helpfully, the CRA developed a calculator which is available online on the Government of Canada's website, which is designed to help employers assess the amount of the subsidy that they are eligible to claim. Applications for the subsidy opened on Monday April 27 and are available through the CRA's My Business account or through a separate online application.

What is a qualifying period?

Initially, the CEWS was to be available from March 15 to June 6, 2020, with three defined periods:

- the period that begins on March 15, 2020 and ends on April 11, 2020;
- the period that begins on April 12, 2020 and ends on May 9, 2020; and
- the period that begins on May 10, 2020 and ends on June 6, 2020.

According to the program's website:

Relevant periods	Claim periods	Required reduction in revenue	Reference periods for comparison under the general approach	Reference periods for comparison under the alternative approach
Period 1	March 15 to April 11, 2020	15%	March 2020 over March 2019	March 2020 over average of January and February 2020
Period 2	April 12 to May 9, 2020	30%	March 2020 over March 2019	April 2020 over average of January and February 2020
Period 3	May 10 to June 6, 2020	30%	May 2020 over May 2019	May 2020 over average of January and February 2020

If an eligible employer has not experienced the required reduction in revenue to qualify to claim the wage subsidy for a particular claim period, it may still qualify to claim the wage subsidy for another claim period if it has experienced the required reduction in revenues in that other claim period.

Once an eligible employer has determined that it has experienced the required reduction in revenue for a particular claim period, it is automatically considered to have experienced the required reduction in revenue for the immediately following claim period (deeming rule). As a result, the employer does not have to make this determination again for that next claim period (see Table 2 below).

The program has since been extended until August 29, 2020.

Who is an eligible employee?

Eligible employees are individuals who are employed in Canada during the applicable qualifying period, and they must not have been without remuneration for 14 or more consecutive days within the applicable qualifying period. So, for example, an employee who was laid off from their job on March 31st 2020 may still be an eligible employee for purposes of the wage subsidy because they were not without income for 14 or more days within that qualifying period that runs from March 15 to April 11.

It's important to note that eligible employees do not have to actually be working. The only requirement is that they are getting paid. So it is possible that if you are in a situation where you cannot physically recall your employees to work, perhaps because your business has been ordered to remain closed or there's simply no work available, it is possible for employees to remain at home, while being paid, and for you to still be eligible for the wage subsidy program.

Is there a limit on the amount of subsidy an employer can receive?

There is no limit on the maximum amount of subsidy that can be provided to one employer; as long as your employees are qualifying, then you can receive $847 per week per employee. The program was originally in place for the period from March 15 to June 6, 2020, and was subsequently extended to August 29, 2020.

Do employers have to "top up" the subsidy?

Although this isn't explicitly stated in the legislation, the government has repeatedly emphasized that employers are expected to make best efforts to top up an employee's wages and compensation to pre-crisis levels. So if you're getting the full 75% wage subsidy of that employee's remuneration, the expectation is that you're going to make best efforts to top up that remaining 25%. Employers who are legitimately unable to provide this top up are still eligible to receive the subsidy, so it's really important to understand that this does not automatically disqualify you from applying for the subsidy. However, we recommend that employers keep very very careful records documenting their efforts to review their availability, the possibility of providing a top up, and determining that such a top up is not possible, in the event that they are audited in the future.

Finally, penalties for abuse for the subsidy are very high. So an employer who receives the subsidy but ultimately is determined not to qualify will have to repay the subsidy in full. Employers who deliberately abuse the system, so for example by artificially engaging in transactions to adjust their revenue in a way that would enable them to qualify for the wage subsidy, when they would not normally qualify for it, is going to attract additional penalties, so not only will these employers have to repay the full amount of the subsidy, but they will also be subject to a penalty equal to 25% of the amount that's claimed.

How does an employee receive the 75% salary from the wage subsidy?

Your employer will pay you with their own money, which could come from company revenues, a loan or some other source. Your employer will then apply to the government for the CEWS (i.e. your employer will be reimbursed for salaries already paid by the employer). So when your employer receives the money from the government through the CEWS, the employer can then use that to pay future salaries or on something else.

Employers will be able to apply for the CEWS through the Canada Revenue Agency's My Business Account portal as well as a web based application, which opened on Monday, April 27th.

Is the subsidy subject to taxes and payroll deductions?

Under the Wage Subsidy, you still have to pay into CPP, EI premiums and tax. The employer will pay you as usual, including making deductions from your wages for CPP, EI and income tax. However, employers who keep employees on payroll, but do not have work for the employees to do, can get a refund on the EI and CPP premiums that they have to pay.

If someone's earnings fluctuate, how is the 75% from the Wage Subsidy determined?

An employee's "baseline weekly remuneration" is defined in the legislation as "the average weekly eligible remuneration paid to the eligible employee by the eligible entity during the period that begins on January 1, 2020 and ends on March 15, 2020, excluding any period of seven or more consecutive days for which the employee was not remunerated."
For new employees, the CEWS provides 75% of the amount of remuneration paid to the employee, up to a maximum of $847 per week. For existing employees (i.e. employees employed before March 15, 2020), the CEWS will be calculated as the lesser of:

- The amount of remuneration paid to the employee, to a maximum of $847 per week, and
- 75% of the employee's baseline weekly remuneration.

Does the subsidy require all staff to be paid their normal hours?

Generally, no, in the sense that the CEWS covers up to 75 per cent of an eligible employee's wages and employers are not legally obligated to pay the remaining 25 per cent. However, prior to the new CEWS legislation coming into force, the government clearly stated that employers are expected to make their best efforts to pay the remaining 25 per cent to bring the salary to pre-crisis levels. Unfortunately, the legislation has not provided us with clarity on this aspect of the CEWS or how the government will assess compliance with this requirement. However, employers should ensure that they have carefully assessed whether or not it would be possible to provide employees with a top-up on the CEWS amounts and keep written records of same.

Importantly, eligible remuneration includes amounts paid to an employee as salary, wages and other taxable benefits, fees, and commissions. These are amounts employers would be required to make payroll deductions on to be remitted to the CRA. Severance pay and items such as stock option benefits or the personal use of a corporate vehicle are not part of eligible remuneration.

When calculating the CEWS, employers will need to determine an employee's baseline remuneration. Baseline remuneration is considered to be the average weekly eligible remuneration paid to an employee during the period of Jan.1, 2020 to March 15, 2020. However, they may exclude from the calculation any period of seven or more consecutive days for which the employee was not paid. In that sense, the CEWS is essentially calculated based on the eligible employee's "normal hours".

Does every employee get paid by the CEWS or just the ones who are still working?

If you are an eligible employer, then you can get the CEWS with respect to “eligible remuneration” paid to “eligible employees”. There is no active work requirement to be an eligible employee. Accordingly, eligible employees may still be working or may not be working but still remain on payroll.

Under the CEWS program, an eligible employee is an individual employed in Canada by the eligible employer during the claim period, except if there was a period of 14 or more consecutive days in that period where they did not receive any pay (eligible remuneration). Thus, the legislation is clear that an employer cannot receive benefits under the CEWS during any period of time where an employee would otherwise qualify for the Canada Emergency Response Benefit (CERB).

Employee eligibility is based on whether the person is employed in Canada, not where they live.

To be clear, an employer would not be able to claim the CEWS for employees who are not in receipt of wages of any kind in an applicable qualifying period (e.g. employees who are on a temporary layoff or on a leave of absence). Employers who want to take advantage of the CEWS in these circumstances will need to recall employees from layoff or offer to pay their employees even where they are unable to work.

How does the CEWS work for employees who have already applied for employment insurance (EI)?

Under CEWS, employees are not eligible if they have been without remuneration for 14 or more consecutive days in the applicable eligibility period.

One of the eligibility criteria for EI is that the employee must have been without work and without pay for at least seven consecutive days in the last 52 weeks. Accordingly, employees who have applied for EI benefits and are eligible to receive the same, but have been without remuneration for 14 or more consecutive days in the eligibility period, would not be an eligible employee under the CEWS program for that claim period.

Significantly, if employees have been laid off or furloughed, they can become eligible for CEWS retroactively, as long as the employer rehires those employees and their retroactive pay and status meet the eligibility criteria for the claim period. The employee must be rehired and paid before they are included in the calculation for the CEWS.

Rehired individuals may have received, or continue to receive, the CERB. Depending on the specific situation, these individuals may be required to repay some or all of the amounts they received. More information to come on this shortly. CERB recipients who already know they will need to repay their CERB payment can access the steps needed to return or repay the benefit.

With the wage subsidy, do employers wait for the government’s money before paying employees?

No. Employers can pay employees with the money they have, which could come from company revenues, a loan or some other source. They will then apply to the government for the CEWS (i.e. you will be reimbursed for salaries already paid by you to eligible employees).

When they receive the money from the government through the CEWS, they can use that to pay future salaries or on something else.

If an office is completely closed, can the employer apply for the CEWS?

Yes, as long as the eligible employees remain on payroll. Employers who want to take advantage of the CEWS in these circumstances will need to recall employees from layoff or offer to pay employees even where they are unable to work (e.g. if the physical location is closed or there is no work available for them). Should they decide to do that, then those employees can continue to remain at home while being reinstated to the payroll.

What if an employee applies for EI, but then their employer ends up getting the Canada Emergency Wage Subsidy?

For the CEWS, there are eligibility criteria for both employers and employees. Accordingly, even if your employer is eligible for the CEWS, it does not mean that all employees within the organization will be included when calculating an employer's entitlements.

The CEWS is available with respect to remuneration paid to employees other than those who have been without remuneration for 14 or more consecutive days in the applicable eligibility period.

in order to be eligible for EI, one of the criteria is that you must have been without work and without pay for at least seven consecutive days in the last 52 weeks.

If you applied for EI benefits and are eligible to receive the same, but you have been without remuneration for 14 or more consecutive days in the eligibility period, then you would not be an eligible employee under the CEWS program. It may be that you are on a temporary layoff or on a leave of absence. In these circumstances, if your employer wants to take advantage of the CEWS, the employer will need to recall you back to work from layoff or offer to pay you even where you are unable to work (e.g. if the physical location is closed or there is no work for you to do). Should your employer decide to do that, then you can continue to remain at home while being reinstated to the employer's payroll.

Significantly, if you have been laid off or furloughed, you can become eligible for CEWS retroactively, as long as the employer rehires you and your retroactive pay and status meet the eligibility criteria for the claim period. Your employer must rehire and pay you before you are included in the employer's calculation for the wage subsidy.

Rehired individuals may have received, or continue to receive, the Canada Emergency Response Benefit (CERB). Depending on the specific situation, these individuals may be required to repay some or all of the amounts they received. More information to come on this shortly. CERB recipients who already know they will need to repay their CERB payment can access the steps needed to return or repay the benefit.

Do employers have an obligation to apply for the subsidy?

No.

Are employers obligated to pay the remaining 25% for the Wage Subsidy?

No, employers are not legally obligated to pay the remaining 25%. However, prior to the new CEWS legislation coming into force, the government clearly stated that employers are expected to make their best efforts to pay the remaining 25% to bring the salary to pre-crisis levels. Unfortunately, the legislation has not provided us with clarity on this aspect of the CEWS.

SECTION VI: CERB AND EMPLOYMENT INSURANCE

Should an employee take CERB over Employment Insurance benefits?

If you became eligible for Employment Insurance ("EI") regular or sickness benefits on March 15, 2020 or later, your claim will be automatically processed through the Canada Emergency Response Benefit (the "CERB").

You retain your eligibility to receive EI after you stop receiving the CERB, and the period that you received the CERB does not impact your EI entitlement.

On the other hand, if you became eligible for EI regular or sickness benefits prior to March 15th, your claim will be processed under the pre-existing EI rules.

If an employee has already applied for EI, but wants CERB instead, do they need to apply for CERB or does it switch automatically?

If you have stopped working because of COVID-19 on or after March 15, 2020, and have already applied for EI Regular or Sickness benefits, you do not need to apply for the CERB. Your application will automatically be transferred to the CERB program.

If you have not already applied for EI benefits and have stopped working due to COVID-19, you should apply for the CERB, whether or not you are eligible for EI. The CERB is available for the period from March 15, 2020 to October 3, 2020.

Starting April 6, 2020, there is a single portal to assist you with the application process. From this portal, you will then be guided through your responses to a few simple questions to complete the application best suited to you (i.e. eligibility for EI benefits or not).

Canadians who are eligible for EI, but who are not eligible for CERB or who need to apply for specialized EI benefits including parental benefits, can continue to apply for EI.

If an employee was rejected for EI, are they able to apply for CERB?

Yes, and as long as you meet the eligibility criteria for CERB, you should be able to receive the payments under CERB.

Will EI retroactively pay employees for the time they have been off work?

Yes, as long as you were eligible for EI during that period and as long as you filed your EI application in a timely manner. You should apply for EI benefits as soon as you stop working. You can apply for EI benefits even if you have not yet received your Record of Employment

("ROE"). If you delay filing your claim for benefits for more than four weeks after your last day of work, you may lose benefits.

How will taking EI now affect maternity claims in the future?

At the time that you apply for maternity or parental benefits, if you received EI benefits in the past 52 weeks, you may not be eligible to receive the maximum number of weeks of maternity or parental benefits.

However, if you've worked 600 hours since your last claim, you could start a new claim. Contact Service Canada to find out what's best for your situation.

Although this question does not ask about the CERB, it should also be noted that you cannot receive maternity or parental benefits at the same time as the CERB. If you cannot return to work due to COVID-19 following your maternity/parental leave, you would be considered to have stopped working due to COVID-19. If you meet the other eligibility requirements you may receive the CERB.

If an employer brings an employee back from lay off on reduced hours, are they able to make their maternity leave claim?

You can apply for maternity/parental leave benefits and a Service Canada agent will review your situation to determine your eligibility. Generally speaking, in order to be eligible, you need to demonstrate the following:

- you're pregnant or have recently given birth when requesting maternity benefits
- you're a parent caring for your newborn or newly adopted child when requesting parental benefits
- your regular weekly earnings from work have decreased by more than 40% for at least one week
- you accumulated 600 insured hours* of work in the 52 weeks before the start of your claim or since the start of your last claim, whichever is shorter (*As an example, 600 hours are equivalent to 20 weeks of work at 30 hours a week)

Working reduced hours might mean that you do not have the requisite number of insurable hours to qualify for maternity/parental benefits. in that case, you can still apply and speak with Service Canada about your unique circumstances to see if you can access those benefits.

SECTION VII: CONSTRUCTIVE DISMISSAL

Did employers have the right to impose temporary layoffs because of the coronavirus?

Contrary to popular belief, employers do not automatically have the right to lay employees off temporarily, even due to an unexpected downturn in business. Doing so can constitute a constructive dismissal.

A constructive dismissal is a unilateral and substantial change to a fundamental term of the employment relationship. The very basis of that relationship is that the employee will work and the employer will pay them their wages for doing so. Directing an employee that they are to temporarily stop working, and you will stop paying them, is clearly a substantial change

to the fundamental relationship and, by definition, a constructive dismissal *unless the employee has agreed*.

The law has always been clear: an employer can only temporarily lay people off if they have an explicit contractual right to do so (either in a collective agreement or an individual contract of employment) or there is an implied right to do so based upon the nature of history of the industry of business. The construction industry is a good example of one where there is an expectation of layoffs in slower seasons.

As discussed below, if the employment contract (or collective agreement) permits temporary layoffs, the situation is entirely different. That is why we routinely recommend that employers include temporary layoff rights in their contracts.

In the absence of an existing right to lay people off, we have recommended that employers obtain the consent of the employees in question. in light of the current situation, in which many businesses are stuck in impossible circumstances with massive decreases in revenue, temporary layoffs can be a reasonable solution.

What should employees do if asked to accept a temporary layoff when there is no contractual right to impose one?

If you are asked to accept a temporary layoff, or even a substantial reduction in hours or pay, you should consider all of the circumstances. While you may have a legal right to refuse, that may not be a wise decision in the long term. Many individuals have concluded that accepting a temporary layoff, or a temporary reduction in hours and/or wages, is a reasonable sacrifice if it will increase the likelihood that they will continue to have a job.

However, we have encouraged many clients to document the conditions of their acceptance of a temporary layoff or other change to the terms of their employment. We recommend that it be made clear that they are accepting the change(s) in light of the unanticipated, unprecedented situation, which is no fault of either party, but that

1. the change is intended to be temporary,
2. the relationship will return to its prior terms and conditions once the situation stabilizes (or some other condition which is reasonable), and
3. the acceptance of the change(s) in this situation will not establish a precedent or allow the employer to impose such changes in the future.

Will courts consider the unprecedented nature of this pandemic and choose not to apply the law of constructive dismissal as it has been interpreted in the past?

Maybe. Many have asserted that it is not right to assess constructive dismissal through a pre COVID-19 lens. That is a compelling position, and We have tremendous sympathy for the businesses that, realistically, have no choice. The law was certainly not created to handle situations like this, but at this point, the law of constructive dismissal has not changed.

It is quite possible that a court will, when asked to interpret the current set of circumstances, decide that the law of constructive dismissal cannot be applied in its current state to the entirely new situation we face. Or it is possible that a government body will intervene. However, neither of those things has happened yet, and it is likely to be years before the issue is finally determined by the courts.

How our courts will treat this unprecedented situation in the future remains to be seen. Rather than take their chances, we have advised our clients to discuss the situation and agree on a plan of action. In most cases, the parties have been able to reach a reasonable compromise that addresses the employee's desire for security with the employer's need to reduce costs in these unusual times.

Is an employer entitled to reduce workers' hours or pay because of the coronavirus?

The answer to this is the same as to the question above, with one important distinction: whereas a temporary layoff is clearly a substantial change, any reduction in hours or wages will have to be assessed to determine whether it meets that threshold. There are many myths out there but in reality, no absolute rules. Every case will have to be assessed based on its own particular circumstances. Nominal changes will not constitute a constructive dismissal, and given that there is an inherent discretion in this analysis, some courts will undoubtedly be reluctant to penalize employers for relatively small pay cuts when the business itself was in dire financial straits.

SECTION VIII: STRATEGIC HR - PLANNING FOR THE FUTURE

Our firm strongly believes in a proactive approach to HR. We use an HR Checkup to work with clients in order to review and draft or update their HR documents. For additional information on this process, click here.

The events of the past few months have likely revealed weaknesses in your core HR documents. You may have realized that you did not have the flexibility to lay people off temporarily in the event of an unexpected downturn, or you may have found that your policies regarding health and safety or remote work were lacking. Now is the time to consider the issues that arose during this pandemic and upgrade your contracts and policies to put you in a stronger position in the future.

How can contracts help you be in a better position for the future?

We always advise employers to use employment contracts for every single employee. Doing so is the single most effective way to increase the employer's rights and create certainty in the employment relationship. The ability to make changes to the terms of employment, to lay an employee off temporarily, or to dismiss an employee with minimal notice can all be established through contract.

For more information on the strategic use of contracts, click here.

How can employers ensure that we have the right to lay people off temporarily if it is necessary in the future?

When an employer encounters difficult financial circumstances, one way to address the situation is to reduce labour costs. However, as discussed, employers cannot simply impose temporary layoffs without the contractual right to do so. Having such a contractual right can dramatically change the situation. While we all hope there will not be another pandemic for a very long time, there may be other circumstances which necessitate a reduction in labour costs.

We have been recommending the inclusion of temporary layoff clauses in employment agreements for years, although we often get pushback from clients who proclaim that they "don't lay people off". We always recommend keeping the clause in "just in case" and the current scenario, which no one anticipated, is a perfect example of why. The clients who took our advice are in a far stronger legal position, with more flexibility to implement cost-cutting efforts. They were able to implement temporary layoffs during the COVID-19 pandemic without risk.

How can termination clauses reduce an employee's severance entitlement?

As discussed above, when an employee is dismissed, either constructively or directly, they are entitled to notice or compensation unless there is just cause (which has nothing to do with financial circumstances). Employees are entitled to "reasonable notice", which can be months or even years, unless there is an enforceable termination clause in an enforceable contract.

To provide an example of the impact of a termination clause, consider a 58 year old clerical worker with 28 years of service. Pursuant to common law, the employee would likely be entitled to notice of approximately 24 months. An employment contract could reduce that to as little as eight weeks. For this reason, employers should consider the use of termination clauses and employees should be mindful of them when signing an employment contract, as they can dramatically reduce their entitlement at a very vulnerable time.

How should employers adapt their policies and procedures in light of their COVID-19 experience?

Employers should not miss the opportunity to learn from this dramatic experience. They should debrief and assess how things unfolded and how their policies and procedures were lacking. Consider any impediments or challenges that arose, specifically in relation to

A. Health and safety
B. Sick days, and
C. Remote work.

Almost every organization can improve their policies and procedures , and now is the opportunity to do so.

CONCLUSION

At the best of times, individuals and employers tend to make decisions about their employment relationships without understanding the legal implications. In these unprecedented and uncertain times, the risks of doing so are even more severe. You may reduce labour costs but expose yourself to a claim in the future, or incur costs out of a mistaken belief that you have to. Individuals may accept layoffs or pay cuts they don't have to accept, or refuse to return to work and inadvertently lose their job.

OTHER RESOURCES

In addition to this guide, you can find information on these and other topics on our website, our blog, and in particular, our running blog on COVID-19 and the workplace. That contains specific posts on topics such as the CEWS and the CERB, among many others, and is constantly being updated.

You can also follow our social media accounts and receive our Employment Law updates in your inbox by signing up for our newsletter.

As we said at the outset, the information in this document is intended to be general in nature and should not be used to replace proper legal advice that is specifically designed to address your needs.

If you think that you might need an Employment Lawyer, you probably do.

We look forward to seeing you all in person one day soon. In the meantime, stay safe and stay informed.

Prepared by Stuart Rudner and Nadia Zaman